IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

LETTERS PATENT APPEAL NO.113 OF 2005

WITH

CIVIL APPLICATION NO.145 OF 2005

IN

WRIT PETITION NO.9149 OF 2004

M/s.Permanent Magnets Ltd. ..Appellant.

Vs.

Shri.Umashankar Pandey & Ors. ..Respondents.

....

Mr.M.S.Naik with Mr.Shirish Naik for the Appellant.

Smt.Nilima Dutta for Respondent No.1.

....

CORAM : A.P.SHAH &

DR.D.Y.CHANDRACHUD, JJ.

4th August, 2005.

P.C. :

1. Heard counsel for the respective parties. Perused the records including the order of the learned single Judge. Briefly the facts are that

the Respondent was in the employment of the Appellant company as a semi scale 'A' Grade worker and was a confirmed employee. The workman had put in about 25 years of service. His leave record was impeccable. He was awarded a merit certificate 'Sanmanpatra' by the company. He was sanctioned leave from 13th June, 2000 to 20th June, 2000. He failed to report for duty on expiry of leave and hence, was issued a charge sheet-cum-suspension order dated 4th October, 2000 under Standing Orders 24(1) and 24(2). The defence of the workman was that he was hospitalized and therefore, could not report for duty till the end of 2000. In support of his defence he submitted medical certificates issued by the Government Hospital.

2. An enquiry was conducted by Enquiry Officer into the charges levelled against the workman and a report was submitted holding that the charges against the workman were proved. A copy of the findings was sent to the workman and finally the order of dismissal was passed on 21st February, 2002. As the reference for adjudication i.e. Reference (IT) 97 of 1992 was pending before the Industrial Tribunal, an application under Section

33(2)(b) of the Industrial Disputes Act, 1947 was submitted on the same day seeking an approval to the order of dismissal. Preliminary point regarding the legality of the enquiry was framed and it was answered against the Appellant company after recording the oral evidence by the Industrial Court. The learned member of the Industrial Court, therefore, declined to grant approval and dismissed the application under Section 33(2)(b).

3. The Appellant company preferred Writ Petition NO.9149 of 2004 which was disposed of by the learned single Judge vide order dated 28th April, 2005 which is impugned in this Appeal. The learned single Judge has held that the enquiry was conducted in a fair and proper manner and the finding of the Industrial Court to that extent was set aside. The learned single Judge has, however, held that the report of the Enquiry Officer was perverse and that the workman was proceeded against by way of victimization and by way of unfair labour practice at the hands of the employer. The petition of the Appellant company was therefore dismissed.

4. The principal contention of Mr.Naik learned counsel appearing on behalf of the Appellant company is that the learned single Judge has ignored the settled position of law that even when the findings of the Enquiry Officer are held to be unsustainable or perverse then the enquiry becomes vitiated and the right arises in favour of the employer to lead independent evidence and prove the charges mentioned in the charge-sheet. Mr.Naik urged that the law is settled by a series of judgments of the Supreme Court that where no enquiry has been held or the enquiry which has been held is not proper or fair or the findings recorded by the Enquiry Officer are perverse, it is open to the employer to adduce additional evidence and satisfy the Tribunal that the dismissal of the employee concerned is justified and in such a case the Tribunal would give opportunity to the employee to meet that evidence and deal with the dispute between the parties in the light of the whole of the evidence thus adduced before it. Mr.Naik placed strong reliance on the decision of the Supreme Court in Kalyani (D.H.) v. Air France, Calcutta (1963) 1 LLJ SC 679), Ritz Theatre (Private) Ltd., Delhi v. Its workmen (1962 LLJ

498), Delhi Cloth and General Mills Co. v. Ludh Budh Singh (AIR 1972 SC 1031). Mr. Naik also contended that no question of victimization or management having a bius against the workman can arise once it is held that the findings of misconduct alleged against the workman were properly arrived at and the domestic enquiry was initiated. In this connection he placed reliance on the decision in the case of M/s. Bharat Iron Works v. Bhgubhai Balubhai Patel (1976 Lab.I.C.4)

5. We are unable to accept the submissions of Mr.Naik. It is true that when the Tribunal comes to the conclusion that the findings reported by the Enquiry Officer are perverse, it would be ordinarily open to the employer to adduce additional evidence and satisfy the Tribunal that the dismissal of the employee concerned is justified. However, it is equally well settled that the question of giving an opportunity to the employer to lead evidence would not arise once the Tribunal comes to the conclusion that the management is guilty of victimization or has been guilty of unfair labour practice or is acting malafide. If the Tribunal finds that the dismissal

of an employee is by way of victimization or unfair labour practice, it will then have complete jurisdiction to interfere with the order of dismissal passed in the domestic enquiry. In Delhi Cloth and General Mills v. Ludh Budh Singh, (supra) Vaidialingam J. speaking for the Bench observed :

> "21. Before we proceed to deal with the contentions of Mr. Anand, it is necessary to state the law regarding the nature of the jurisdiction exercised by a Tribunal in dealing with an application under Section 33 of the Act. We had occasion to deal with a similar aspect in Delhi Cloth & General Mills Co. v. Ganesh Dutt, C.A. No.982 of 1967, D/- 17-12-1971 = 41 FJR 4 (SC).
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> It was observed therein:
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> "The nature of the jurisdiction exercised by an Industrial Tribunal in such circumstances is a very limited one and it has been laid down by several decisions of

this Court. The legal position is that where a proper enquiry has been held by the management, the Tribunal has to accept the finding arrived at in that enquiry unless it is perverse or unreasonable and should give the permission asked for unless it has reason to believe that the management is guilty of victimisation or has been guilty of unfair labour practice or is acting mala fide. (Vide Punjab National Bank, Ltd. v. Its Workmen, (1960) 1 SCR 806 = AIR 1960 SC 160), Bharat Sugar Mills Ltd. v. Jai Singh, (1961) 2 Lab LJ 644 (SC) Management of Ritz Theatre (P) Ltd. v. Its Workmen, (1963) 3 SCR 461 = (AIR 1963 SC 295) and Mysore Steel Works v. Jitender Chandra Kar, (1971) 1 Lab LJ 543 (SC)." (emphasis supplied)

6. In Bharat Sugar Mills Ltd. v. Jai Singh (1961) II L.L.J. 644 the Court observed that :

"Where there has been a proper enquiry by the management, itself, the tribunal, it has been settled by a number of decisions

> of this Court, has to accept the finding arrived at in that enquiry unless it is perverse and should give the permission asked for unless it has reason to believe that the management is guilty of victimization or has been guilty of unfair labour practice or is acting mala fide."
> (emphasis supplied)

7. This is also clear from the following observations made in the judgment of Constitution Bench in Kalyani (P.H.) v. Air France, Calcutta (1963) 1LLJ 679 :

> "If the inquiry is not defective, the labour court has only to see whether there was a prima facie case for dismissal, and whether the employer had come to the bona fide conclusion that the employee was guilty of misconduct. Thereafter, on coming to the conclusion that the employer had bona fide come to the conclusion that the employee was guilty, i.e., there was no unfair labour practice and no

> victimization, the labour court would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If the inquiry is defective for any reason, the labour court would also have to consider for itself on the evidence adduced before it whether the dismissal was justified." (emphasis supplied)

8. In the present case the learned single Judge has exhaustively discussed the material on record and recorded a categorical finding that the dismissal is by way of victimization and it amounts to unfair labour practice at the hands of the employer. The relevant observations of the learned single Judge are reproduced below :

> "10. The scope of this Petition will have therefore, to be considered on the basis of the above mentioned requirements of law. As noted earlier, the employee in his explanation to the charge-sheet had pointed out that he was hospitalised when he went to his native place on sanctioned leave and on 24.8.2001 when the inquiry recommenced,

he placed on record all the certificates. The first Medical Certificate issued by a private Medical practioner at Kotha Bazar, stated that the workman was under the said Doctor's treatment from 23.6.2000 to 28.6.2000 (six days) as he was suffering from fever. The second Medical Certificate dated 29.6.2000 was issued by a Government Hospital where the workman was admitted from 29.6.2000, thereafter, he was issued another Medical Certificate dated 10.8.2000 which indicated that he would be under medical treatment for another six weeks. The next Medical Certificate dated 21.9.2000 which stated that he would take ten more days to recover fully. The fitness certificate dated 30.9.2000 was finally issued by the said Government Hospital and he was declared to be fit to resume duties. Before the Enquiry Officer, the workman was cross-examined by the Presiding Officer and he was asked why he could not submit medical certificates earlier, the workman replied that he was not in a condition to send the certificates

by post and thought that on reporting for duty, he would submit all these certificates. The enquiry proceedings also indicate that his salary for the month of June, 2000 was released on the basis of an authority letter. In his reply to the approval application submitted before the Tribunal, the workman specifically stated that on 1.10.2000, he started his return journey to Mumbai and went to report for duty on 3.10.2000 at 8.30 a.m. He was told by the Security personnel that there was a notice not to allow him to join for duty. When he again reported for duty on subsequent two days, he was not allowed to report for duty and on 6.10.2000, when he went to report for duty, again he requested to accept the medical certificates but instead, he was served with the charge-sheet and suspension order dated 4.10.2000. This service in person is not disputed. The Company had claimed in the charge-sheet that when the workman failed to report for duty on 26.6.2000 reminders were sent to him on 15.7.2000 and

14.9.2000. There was no proof brought on record that these letters were served on the Petitioner or any of his family members. They were just returned by the postal authorities and were not registered letters. The evidence placed before the enquiry offier thus went to prove that the workman was under medical treatment and as soon as he was declared fit to report for duty, he reported for duty on 3.10.2000 but was not allowed to report. Though he overstayed the sanctioned leave for about more than three months, he had furnished sufficient explanation regarding the circumstances compelling him to remain away from duty and therefore, the charge levelled by the Company could not be substantiated. There was no reason for the enquiry officer to record a finding that the charges were proved. As noted earlier, if the first charge was not proved, automatically the second charge would not survive. It was necessary for the Tribunal to examine the evidence on record placed before the domestic tribunal and come to a

conclusion that whether the prima facie case was made out by the employer to support the order of dismissal. Though the Tribunal failed to do so, having examined the evidence before the Enquiry Officer, the irresistible finding is that there was no material to support the charges levelled against the workman.

11. The workman had put in about 25 years of service which is not disputed. He was shown to be an officer bearer of the Association of Engineering Workers which was a rival Union to the existing i.e. Kamgar Utkarsha Sabha. His leave record was impeccable. He was awarded a merit certificate "Sanman Patra" by the Company. He did not fall in the category of habitual absence. The first enquiry session commenced on 14.10.2000 but thereafter, there was no progress in the enquiry till 24.8.2001 and the enquiry officer was changed. In the meanwhile, the workman remained under suspension. The Model Standing Orders enable the employer to

> place a workman under suspension but such a power is normally exercised when the employer forms an opinion that the presence of the charge-sheeted employee is likely to vitiate the discipline in the factory or is likely to tamper with the evidence. In the case of charge of absenteeism or overstaying the sanctioned leave, the employer revoking the power of suspending the employee is most unwarranted. All these acts cumulatively indicate that the employee was proceeded agaisnt by way of victimisation and thus an act of unfair labour practice at the hands of the employer."

9. In the light of the settled legal position it is not possible to accede to the prayer of Mr.Naik to remand the matter to the Industrial Tribunal for giving an opportunity to the employer to lead evidence to justify the dismissal. We also do not find any merit in the submission of Mr.Naik that the learned single Judge has committed an error in recording the finding of victimization as

the misconduct was established. The learned single Judge has come to the conclusion that the report of the Enquiry Officer was totally perverse and there was no material to prove the misconduct and the action of the employer was by way of victimization and amounted to unfair labour practice. In the circumstances, no interference is warranted with the order of the learned single Judge. The Appeal is dismissed with costs.

Mr.Naik makes an oral application for leave to appeal to the Supreme Court. The application is rejected.